

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA**

**DOLGENCORP, INC., a wholly owned
subsidiary of DOLLAR GENERAL CORPORATION,
Respondent**

and

Case 17-CA- 21851

**TEAMSTERS LOCAL 833, affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Charging Party Union**

***Stanley D. Williams*, Esq.,**
for the General Counsel
***Dion Y. Kohler*, Esq.,**
for the Respondent
***Bruce C. Jackson, Jr.*, Esq.,**
for the Charging Party Union

DECISION¹

Albert A. Metz, Administrative Law Judge. The issues presented are whether the Respondent prohibited employees from talking about union related matters while on work time and, if so, did this order violate Section 8(a)(1) of the National Labor Relations Act (Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

¹ This case was heard at Columbia, Missouri on February 11, 2003. All dates refer to 2002 unless otherwise stated.

² 29 U.S.C. § 158 (a)(1).

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, a Kentucky corporation, operates numerous retail stores and distribution centers in several states. The only location involved in this case is the Respondent's distribution center at Fulton, Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICE ALLEGATIONS

During the summer of 2002 the Union was engaged in an organizational effort at the Respondent's Fulton distribution center. It is undisputed that prior to the union organizing campaign employees were free to talk without restriction as to any subject as long as such conversations did not interfere with work. All parties also agree that at the material times the Respondent had in effect a lawful no-solicitation rule.

The Government alleges the following admitted supervisors prohibited employees from discussing union matters during working time. The Respondent denies that these supervisors ever forbade such discussions.

A. Michael Williams

Respondent's former employee, Mark Angel, worked for the company starting in 1999 until August 1, 2002, at which time he was discharged. Angel testified that on August 1 he attended a morning departmental meeting conducted by his supervisor, Michael Williams. Angel recalled that during this meeting Williams told the employees he did not see why the workers would want a union to represent them and that the Respondent did not want them to discuss union activity during working hours. Williams allegedly added that he "did not care if the employee was for or against the union, they were not to talk about it except during the specified times."

Jeff Derr, an employee working in the lift department, gave testimony regarding what Williams had said in a July morning meeting of employees. He recalled Williams saying that they "could only talk about the union during scheduled breaks, before and after work and lunch breaks."

Williams left the Respondent's employment in October 2002. He testified that he supervised approximately 30 equipment department employees in August 2002. Williams attended two training sessions held by the Respondent for the purpose of educating supervisors about union organizing campaigns. Part of that training informed him that the Respondent's no-solicitation rule meant "An employee was not supposed to solicit other employees during the time that they were supposed to be working." Williams recalled telling employees that "they could not stop their work in order to talk about the Union whether it was to solicit or just to talk and answer questions. They needed to continue working."

The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). Specifically, with

regard to an employer's prohibition of its employees discussing unions, the Board in *Teledyne Advanced Materials*, 332 NLRB 539 (2000) stated as follows:

It is well established that an employer violates Section 8(a)(1) when, as here, employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' activities in regard to the union organizational campaign. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), *enfd.* 608 F.2d 762 (9th Cir. 1979).

I found Williams, Angel and Derr all to be honestly attempting to recall what Williams said on the subject of employees discussing unions. Considering, however, the demeanor of the witnesses and the specificity of their testimony, Derr and Angel, impressed me as being the most accurate observers as to what was said. I credit their testimony and find that Williams did go beyond the scope of what is allowed under the Act and told employees they could not talk about unions during work time. This prohibition in the face of the history of employees being able to discuss any subject while at work is a violation of Section 8(a)(1) of the Act. *Sea Ray Boats*, 336 NLRB No. 70 (2001).

B. Roger Baston

Employee Joe Robinson testified that his supervisor, Roger Baston, held an afternoon meeting of receiving department employees in late July or early August of 2002. Robinson recalled that at the meeting there was a reminder about the Respondent's impending picnic. He further testified that during this meeting Baston told the assemblage about the benefits provided by the Respondent without the Union. Baston stated that the employees were guaranteed a 40 hour workweek and the company had never had any layoffs. Baston urged the employees not to sign union authorization cards as this was "like writing a blank check to the union." According to Robinson, Baston also told the employees that, "we shouldn't be talking about it [the Union] on company time. If we wanted to talk about unions, we could do that during breaks, lunches and before and after work." Baston did not state the reason for such a rule.

Employee Janet Burget testified that she was in attendance at a similar meeting as described by Robinson. Although she could not recall the exact date of the meeting she did remember that the entire distribution center was shut down one summer afternoon so that employees could attend departmental meetings about the union organizing campaign. Burget remembered Baston making the case for the Respondent being a good employer and that the employees did not need union representation. She recalled him also stating that, "we were not allowed to discuss the Union, just on our breaks and on our lunch hour and before and after work." She did not remember Baston giving any specific explanation for the rule. Burget testified the Respondent had never before that time restricted employees as to what they could talk about during their working time.

Employee Rusty Hultz testified that on two occasions during the summer of 2002 he was present at meetings where Baston told employees they could not talk about the Union during working time. Hultz recalled that at each meeting Baston did tell the employees that they could discuss the Union before and after work and during breaks and lunch periods at the distribution center.

Employee Rose Snook testified that in the summer of 2002 she attended a morning meeting of employees conducted by Baston. She recalled him telling the workers that they should "not talk union stuff during work hours." Snook affirmed that prior to Baston's pronouncement, employees had always discussed any subject they wanted.

Supervisor Baston testified as to his recollection of what he told employees about their union talk during work time. Respondent's counsel asked Baston if he had ever talked to employees regarding union solicitation. Baston stated that he had done so twice in the summer of 2002 during morning employee meetings. He recalled that he had been instructed by higher supervision to bring the subject to the attention of employees. Baston testified that he told the employees at both meetings they could solicit "during break times and lunch times... and not to do it during work times." He denied ever telling the workers that they could not talk about the Union during work time. Baston recalled an afternoon meeting he held with employees in the same time period where the subject matter of the company picnic was discussed. Baston denied that he told employees anything concerning union talk in that meeting.

Considering the demeanor of the witnesses and the detail of each of their recitations, I find that Robinson, Burget, Hultz and Snook were the most persuasive as to what Baston told them. I credit their testimony. I find that Baston did tell the employees they were prohibited from discussing the Union during work time. I conclude this rule was disparate as it related only to union discussions and is thus a violation of Section 8(a)(1) of the Act.

C. Danny Pool

Respondent's former employee Don Zatorski testified that in the first part of August he had come to work to pick up his pay check and talked to some fellow workers. They told him of meetings management had held with employees that day presumably discussing union activity. What he understood was said in these meetings upset Zatorski and he questioned Operations Manager, Danny Pool, about the matter in the shipping office the following week. He asked Pool if it were true that there was a rule that employees could only talk about the Union before and after work as well as on breaks. According to Zatorski, Pool replied that this was correct. Zatorski asked if that applied to everybody. Pool said that it did. Zatorski asked, "Supervisors are not allowed to talk about non-union activities during work time?" Zatorski testified that Pool said that was correct, that there were no exceptions. Zatorski said, "Okay. I just wanted to make sure so ... that my people (pro-union employees) abide by your rules."

Danny Pool testified that Zatorski asked him in this conversation whether it was okay for employees to talk about the Union. He told Zatorski that such conversation was permitted "as long as there was not solicitation or distribution of literature, employees can talk about anything they want."

Pool's demeanor and recollection of what was said to Zatorski impressed me as being the most accurate account of what was said on this occasion. I credit Pool's testimony. I find that nothing in Pool's remarks violated the Act.

D. Bob Horn and Gary Burry

Employee Joe Robinson testified that on August 26, 2002, he had clocked out from work and stopped to talk with Elizabeth, a co-worker. As they talked the subject turned to the Union. Robinson testified that their discussion did not involve union solicitation. At that point supervisor, Bob Horn, approached them and, according to Robinson, told him that he should not be discussing union activity while he was on the clock. Robinson replied that he had checked out of work. Horn stated that Robinson should not be bothering Elizabeth as she was on the clock and should be working. Horn did not testify at the hearing.

The following day supervisor, Gary Burry, talked to Robinson. According to Robinson, Burry mentioned the prior day's encounter with Horn and told him that employees should not hinder other employees work. Burry then stated that they should not be talking about the union at all during company time. Burry did not testify at the hearing.

Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to the party. **Auto Workers v. NLRB**, 459 F.2d 1329 (D.C. Cir. 1972). Such an adverse inference is appropriate in this instance. I find that had Horn and Burry testified their testimony would have been contrary to the Respondent's defense that they did not unlawfully tell Robinson that he could not discuss union activity on working time. **International Automated Machines**, 285 NLRB 1122-1123 (1987). I credit Robinson's uncontroverted testimony as to what Horn said to him on August 26 and what Burry told him the following day. I find nothing wrong with Horn making sure that Elizabeth's work was not interrupted by casual employee conversation. I do, however, find that the statements of Horn and Burry that employees should not be discussing union activity while on the clock is an unlawful restriction of their Section 7 rights and is a violation of Section 8(a)(1) of the Act. **Teledyne Advanced Materials**, 332 NLRB 539 (2000).

CONCLUSIONS OF LAW

1. Dolgencorp, Inc., a wholly owned subsidiary of Dollar General Corporation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters Local 833, affiliated with International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Dolgencorp, Inc., a wholly owned subsidiary of Dollar General Corporation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Disparately prohibiting employees from talking about unions while on working time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the disparate rule that employees are not free to discuss unions while on work time.

(b) Within 14 days after service by the Region, post at its facility in Fulton, Missouri, copies of the attached notice marked "Appendix." ⁴ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2002. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated

Albert A. Metz
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

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**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT disparately prohibit employees from talking about unions while on working time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL rescind the disparate rule that employees are not free to discuss unions while on work time.

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**Dolgencorp, Inc., a wholly owned subsidiary of
Dollar General Corporation, Inc.
(Employer)**

Dated _____ **By** _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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8600 Farley Street, Suite 100, Overland Park, KS 66212-4677
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

- 5 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.